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Sued As The American Red Cross and STEVE
BROWN

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 BRIAN SETENCICH,

13 Plaintiff,

14 v.

15 THE AMERICAN RED CROSS, a non-
16 profit corporation, STEVE BROWN,
ROBERT BROWNING and DOES 1
17 through 30, inclusive,

18 Defendants.
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Case No. C07-03688 SBA

[Honorable Bernard Zimmerman]

**OPPOSITION OF AMERICAN RED CROSS
BLOOD SERVICES SOUTHERN
CALIFORNIA REGION TO PLAINTIFF
BRIAN SETENCICH'S MOTION TO
COMPEL DEFENDANT AMERICAN RED
CROSS' FURTHER RESPONSES TO
DEMAND FOR PRODUCTION**

**Trial Date: January 12, 2009
Complaint filed: March 13, 2007**

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I. INTRODUCTION

Plaintiff Brian Setencich ("Plaintiff") requests that ARC produce documents that are purportedly "essential for Plaintiff to prove his claim of association discrimination." (Pl. Mot. to Compel, 2:11:12). In good faith, ARC has produced all documents responsive to the Requests for Production listed in the Motion to Compel, except for Request for Production No. 1, which seeks documents that are not relevant and thus not, "reasonably calculated to lead to the discovery of admissible evidence" pursuant to Federal Rule of Civil Procedure Rule 26(b)(1) ("Rule 26(b)(1)") and Requests for Production Nos. 8 and 20 which seek documents which are properly protected by the attorney-client privilege and/or work product doctrine.

The documents sought pursuant to Request for Production No. 1 include files prepared over one year after ARC decided not to hire Plaintiff and in connection with an investigation of Marc Jackson ("Jackson"), an ARC employee who is represented by Plaintiff's counsel in a Charge of Discrimination that Jackson made with the California Department of Fair Employment and Housing ("DFEH"). Plaintiff's efforts to compel the production of documents related to an internal investigation of Jackson appear to be an inappropriate attempt to use the present case to conduct discovery for Jackson's unfiled case, regardless of the irrelevance of the details of the investigation to Plaintiff's claims. Plaintiff's overreaching tactics should not be permitted, and the Motion to Compel should be denied.

With regard to documents responsive to Requests for Production Nos. 8 and 20 which are being withheld on the bases of privilege and/or work-product, these items reflect communications between ARC managers and ARC's in-house counsel regarding the scope of ARC's obligation to provide accommodations for Jackson's disability (an issue which ARC maintains is also irrelevant to this suit), counsel's opinions and recommendations related to that obligation and communications created in anticipation of litigation. Plaintiff has not provided a sufficient basis to require ARC to disclose these communications; therefore, his request for an order that they be disclosed should be denied.

II. FACTUAL BACKGROUND REGARDING PLAINTIFF'S CASE

On or about June 1, 2005, Plaintiff submitted an application for employment to ARC based on a referral from Jackson, his former colleague who had worked on Plaintiff's campaign and as his chief of staff when Plaintiff became a member of the California State Assembly. Jackson was ARC's Director of Communications when Plaintiff applied to work at ARC, and he is currently employed as its Director of Public Affairs and Communication of Blood Services for the West Division.

During the application process, Plaintiff informed ARC personnel that he had been convicted in 2000 of the felony of filing a false tax return in 1997 (Pl. First Am. Compl. ¶ 24). On July 1, 2005, Division Vice President Steve Brown ("Brown") advised Jackson by e-mail that ARC would not hire Plaintiff for the Communications Manager position due to his felony conviction. On February 21, 2006, Brown reiterated ARC's decision not to hire Plaintiff in an e-mail to Mr. Jackson.

In late January, 2007, more than a year after ARC had decided that it was not going to hire Plaintiff for the Communications Manager position, ARC conducted an internal investigation of Mr. Jackson's workplace conduct based on complaints it had received from his subordinates. On March 14, 2007, Jackson filed a Charge of Discrimination against ARC with the DFEH for discrimination relating to the disciplinary action ARC had taken and requested an immediate right to sue. Counsel for Plaintiff, Jill Telfer, represents the rights and interests of Mr. Jackson in his DFEH action. On March 13 2007, Ms. Telfer filed a complaint against ARC for association discrimination on behalf of Plaintiff. On March 6, 2008, Ms. Telfer filed a second DFEH charge on behalf of Jackson, again seeking an immediate right to sue.

III. BURDEN ON MOVING AND RESISTING PARTIES

On a motion to compel discovery, the moving party must demonstrate actual and substantial prejudice from the denial of discovery. *In re Sulphuric Acid Antitrust Litigation*, 231 F.R.D. 331, 339 (N.D. Ill. 2005); Willam W Schwarzer, A. Wallace Tashima & James M. Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 11:2379.1 (2007). Plaintiff has failed to meet this burden as Plaintiff has not offered any evidence to show that he

1 will suffer actual and substantial prejudice from denial of the documents he requests. Here
 2 Plaintiff relies on the assumption that in order to establish the elements of an association
 3 discrimination claim, he must establish that there was a discriminatory animus against Jackson
 4 because of his disability.¹ Not only has Plaintiff provided no support for this assumption, even if
 5 it were correct, there is no evidence that ARC held a discriminatory animus against Jackson at the
 6 time it made the decision not to hire Plaintiff, and that hiring decision is too remote in time and
 7 otherwise removed from the issues surrounding its investigation of complaints made regarding
 8 Jackson's workplace misconduct to make the latter a proper topic of discovery in *this* action.

9 ARC's burden is to demonstrate that the discovery it opposes should not be allowed and to
 10 clarify, explain, and support its objections. *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283
 11 (C.D. Cal. 1998). ARC meets this burden with the analysis provided herein.

12 **IV. DISPUTED DISCOVERY**

13 **A. PLAINTIFF'S REQUEST FOR PRODUCTION NO. 1:**

14 *Any and all documents which make up the Investigative file(s) referenced in Marc*
 15 *Jacobson's Performance Improvement Plan of February 22, 2007, including but not limited to*
 16 *interview notes, the investigator's report, documents gathered, and documents referencing any*
 17 *complaint against Marc Jackson.*

18 **SUMMARY OF ARC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

19 ARC maintains that this request seeks documents which are not relevant and not
 20 reasonably calculated to lead to the discovery of admissible evidence.

21 **1. The Documents Requested Pursuant To Plaintiff's Request For** 22 **Production No. 1 Should Remain Protected**

23 **a) Rule 26(b)(1) Limits Discovery to Matters Relevant to a Party's** 24 **Claim or Defense**

25 Rule 26(b)(1) states, in pertinent part, as follows: "Parties may obtain discovery regarding
 26 any nonprivileged matter that is *relevant* to any party's *claim or defense* ... Relevant information

27 ¹ Ms. Telfer states in her May 27, 2008 letter to the Court that "it is undisputed that Setencich was qualified for the
 28 job." While not pertinent to the analysis in this brief, it should be noted that ARC does dispute that Setencich was
 qualified for the job.

1 need not be admissible at the trial if the discovery appears reasonably calculated to lead to the
2 discovery of admissible evidence.” (emphasis added). Prior to the adoption of the 2000
3 amendments to Rule 26, relevance was broadly and liberally construed for discovery purposes to
4 include any information that may be relevant to the subject matter of an action. James WM.
5 Moore, Moore’s Federal Practice, § 26.41[6][b] (2008); *See, e.g., Oakes v. Halvorsen Marine*
6 *Ltd.*, 179 F.R.D. at 283 (commenting that a request for discovery should be considered relevant if
7 there is “any possibility” that the information sought may be relevant to the subject matter of an
8 action). As the present language of Rule 26(b)(1) establishes, without an order of the court,
9 parties may obtain discovery only of nonprivileged matters relevant to a party’s claim or defense.
10 Rule 26(b)(1) was narrowed as a means of involving the court “more actively in regulating the
11 breadth of sweeping or contentious discovery.” Fed. R. Civ. P. 26 advisory committee’s note.
12 Pursuant to the 2000 amendments, the parties and the courts are meant to “focus on the actual
13 claims and defenses involved in the action.” *Id.*

14 b) Plaintiff’s Request for Production No. 1 Is Not Focused on
15 Plaintiff’s Association Discrimination Claim Or ARC’s Defenses

16 In order to establish his cause of action for *association* discrimination, Plaintiff must
17 prove that ARC “refuse[d] to hire” Plaintiff “because” he “is associated with a person who has, or
18 is perceived to have [a disability].” *See* Cal Gov’t Code §§ 12926(m) and 12940(a). As the
19 relevant provisions of the Fair Employment and Housing Act (“FEHA”) are written, being
20 associated with a person who has a protected characteristic is itself a protected classification.
21 Therefore, in order to prevail on his claim for association discrimination, Plaintiff must establish
22 that it he was associated with a disabled person (which is not disputed for the purposes of this
23 motion) and that there is a causal connection with this association and ARC’s decision not to hire
24 him. In pursuing documents in response to Request for Production No. 1, however, Plaintiff is
25 attempting trying to obtain access to a report of an investigation made in connection with an
26 internal complaint against ARC employee Marc Jackson in the hopes of showing discrimination
27 against Jackson and then asking to the Court to infer that because of its discrimination against
28 Jackson, ARC was discriminating against Plaintiff as well. Not only has Plaintiff failed to

1 provide any legal authority for the proposition that alleged future acts of discrimination against
 2 Jackson are relevant to whether Plaintiff's association with Jackson was a motivating factor in the
 3 decision not to hire Plaintiff, there is no evidence to indicate that ARC was engaging in
 4 discrimination against Jackson in 2005 or 2006 when it was considering Plaintiff's application.

5 The absence of a requirement for Plaintiff to establish ARC's alleged discrimination
 6 against Jackson, and thus the lacking relevance of the documents sought by Request for
 7 Production No. 1, is reflected in Judge Armstrong's reliance on two California Supreme Court
 8 cases in denying ARC's motion to dismiss the association discrimination cause of action. The
 9 Court, as quoted by Judge Armstrong "held that a shopping center did not have the right to
 10 exclude the customer *based only on his association with a young man 'who wore long hair and*
 11 *dressed in an unconventional manner'.*" *Harris v. Capital Growth Investors XIV*, 52 Cal.3d
 12 1142, 1152 (1991), quoting *In re Cox*, 3 Cal.3d 205 (1970) (Emphasis added in Judge
 13 Armstrong's Order, Docket No. 52, p. 9, lines 3-6). Notably, in exploring whether or not the
 14 shopping center properly excluded Cox, the Court did not explore whether the shopping center
 15 discriminated against the man "who wore long hair and dressed in an unconventional manner."
 16 The Court looked at whether the plaintiff's association with the long-haired young man caused the
 17 shopping center to exclude the plaintiff. Judge Armstrong also cites to the ruling in *Winchell v.*
 18 *English*, 62 Cal.App.3d 124 (1976) that a business "could not discriminate against 'one's right of
 19 association on account of the associates' color" Again, the focus is placed on the right of
 20 association with someone who is a member of a protected class. Further, as Judge Armstrong
 21 described the issue, could "an employer refuse to hire a person outside a protected class, solely
 22 because he or she had a friend in a protected class"? Put in other words, Plaintiff's personal right
 23 of action against ARC is for any damage caused by ARC's decision not to hire Plaintiff if that
 24 decision was made because he is friends with a disabled person. Plaintiff does not have a private
 25 right of action based on how ARC may interact with Jackson based on his disability. That right
 26 of action belongs only to Jackson, and if he wants to pursue it, he should do so by filing a lawsuit
 27 against his employer and deciding with his attorney how to resolve the conflict which would be
 28 created by Plaintiff's counsel representing Jackson, who is a managing agent of the ARC;

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1 however, Jackson should not use his friend, this court and this case as a backdoor method to do
2 pre-filing discovery to support his own purported claims, which is exactly what the purpose of
3 Plaintiff's case appears to be.

4 Surely Plaintiff is not taking the position that he would not have a claim and could not
5 establish association discrimination if ARC chose not to hire him because his parent or significant
6 other was disabled or of another race or national origin. And if that were the case, what discovery
7 and information would be relevant to establishing Plaintiff's claims? Obviously Plaintiff would
8 not be doing discovery regarding the defendant's interactions with his relative or how his
9 relative's employer treats him or her. Certainly the essential elements of Plaintiff's cause of
10 action and the rules of discovery do not change just because the person who belongs to a
11 protected class with whom Plaintiff is associated happens to be employed by the defendant.

12 Moreover, even if Plaintiff had established that he needs to show discrimination against
13 Jackson in order to establish a discriminatory animus against Plaintiff, the ARC's investigation of
14 Jackson's workplace conduct in 2007 and ARC's motivation for declining to hire Plaintiff more
15 than a year earlier are too remote in time for the investigative file to be relevant in this action.
16 Specifically, the allegations pled in this case regarding the discriminatory conduct against Jackson
17 are that ARC did not hire Plaintiff or any other person, whose assistance Jackson allegedly
18 needed, and that Jackson was denied a reasonable accommodation in 2005 when, rather than
19 taking the full leave of absence ARC requested he take in connection with his recovery efforts, he
20 requested, after months of being allowed to working mostly from home (to the detriment of ARC
21 and the Communications department), to continue working part time from home.

22 Plaintiff has not established the relevance of the investigative file to Plaintiff's
23 relationship with Jackson or the decision not to hire Plaintiff which allegedly was based on the
24 fact that Plaintiff was associated with a disabled person. Nor has Plaintiff established how or
25 whether the investigative file relates to ARC's practices relating to hiring convicted felons which
26 is the reason ARC has asserted for not hiring Plaintiff. Accordingly, Request for Production No.
27 1 does not relate to a claim or defense asserted in this action, and Plaintiff's Motion to Compel
28 the production of documents in response to Request for Production No. 1 should be denied.

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B. PLAINTIFF'S REQUEST FOR PRODUCTION NO. 2:

The personnel action forms from January 2000 until January 1, 2008, evidencing any and all hire dates for persons who had felony convictions, including but not limited to the documents evidency [sic] Angie Turner's rehire as a nurse.

SUMMARY OF ARC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

Without waiving its objections, ARC has created two charts and produced all documents which are responsive to this request.

1. ARC Will Agree To A Protective Order

ARC's counsel is preparing a stipulated protective order for Plaintiff's counsel to approve in connection with providing the names of the individuals Plaintiff seeks. Although Plaintiff has sensationalized the circumstances surrounding Angie Turner's 20+ year-old conviction and ignores significant differences between the relationship between Turner's conviction and her blood collection job with ARC (in which her identity is essentially anonymous to members of the public) and the felony fraud conviction of Plaintiff who was a former public figure applying for a role to interact with the media on ARC's behalf, ARC has already produced a Change of Status form to Plaintiff which reflects the individuals who hired Ms. Turner to work for ARC in 2006. ARC has not located a separate "Requisition for Personnel" form such as the one attached to counsel's May 27 Letter as Exhibit B which reflects Ms. Turner's hiring in 2006. Plaintiff has also produced forms reflecting the hiring of a couple of other individuals with felony convictions during the time period indicated in this request. There is nothing left for the Court to compel ARC to produce with regard to this request.

C. PLAINTIFF'S REQUEST FOR PRODUCTION NO. 8:

Any and all documents concerning Marc Jackson's request(s) for reasonable accommodation as a result of his medical condition, including but not limited to letters approving or denying his request.

SUMMARY OF ARC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

ARC has produced an amended privilege log in response to this request (Exhibit A) and reasserts its position that the documents referenced therein are protected by the attorney-client

1 privilege, the work product doctrine, or both. The items listed in the log were generated either:
 2 (1) to obtain or provide advice concerning compliance with the legal obligation to accommodate
 3 Jackson's disability pursuant to FEHA or (2) in anticipation of litigation filed by Jackson alleging
 4 that ARC failed to accommodate his disability.

5 **1. Factual History Of Privileged Material**

6 In 2005, Jackson requested that he be able to work from home as an accommodation for
 7 his disability. ARC granted this request. A few months following this request, concerns arose
 8 regarding Jackson and his oversight of the Public Affairs and Communications department which
 9 requires a regular management presence. As a consequence, ARC reviewed Jackson's status to
 10 determine whether Jackson was effectively performing the essential functions of his job with the
 11 accommodations ARC had provided. ARC personnel communicated regularly with Christian
 12 Hansen in the Office of General Counsel to ensure that they were fulfilling their legal obligations
 13 under applicable federal and state law concerning this matter.

14 In February, 2007, ARC issued a Performance Improvement Plan to Jackson arising from
 15 complaints within his department concerning his work performance. Thereafter, it was brought to
 16 the attention of ARC management personnel that in response to having received the Performance
 17 Improvement Plan, Jackson announced loudly and in front of his subordinates that he was
 18 contacting his attorney because he was being "unjustly persecuted". ARC management personnel
 19 interpreted this as a threat that Jackson was going to file a claim against ARC. A number of
 20 communications followed between Chris Hansen and management personnel regarding the
 21 litigation that was anticipated to follow from Jackson's conduct.

22 **2. Communications Of In-House Counsel Are Protected By the Attorney- 23 Client Privilege If The Communications Were Made For The Purpose 24 Of Obtaining Or Providing Legal Advice**

25 Internal communications involving in-house counsel are protected by the attorney-client
 26 privilege when the speaker made the communications for the purpose of obtaining or providing
 27 legal advice. *U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). Legal
 28 advice has been interpreted broadly to mean any advice "rooted in the law." *Id.* For example,

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1 communications regarding the tax consequences of a particular transaction have been deemed to
 2 constitute legal advice. *Id.* Communications between in-house counsel concerning potential
 3 liability of actions taken in the regular course of business, such as regular communications
 4 between reporters for a magazine and in-house counsel for the magazine concerning liability for
 5 libel regarding the publication of articles, are made for the purpose of obtaining or providing legal
 6 advice and are protected by the attorney-client privilege. *See Tucker v. Fischbein*, 237 F.3d 275,
 7 288 (3rd Cir. 2001).

8 Jill Telfer's May 27, 2008 letter to the Court implies that reasonable accommodation is an
 9 action taken in the normal course of business and, therefore, communications concerning such are
 10 not subject to the attorney-client privilege. The letter states, "merely because ARC's in house
 11 counsel must approve of reasonable accommodation does not mean communications with him are
 12 privileged." First, Browning did not testify that in-house counsel must approve of reasonable
 13 accommodations, but rather that he consulted with in-house counsel to determine whether an
 14 accommodation request was reasonable under applicable federal and state law. (See Exhibit B).
 15 The reasonable accommodation of a disabled employee pursuant to the ADA or FEHA presents
 16 myriad issues "rooted in the law." The specter of litigation looms large in this context.
 17 Accordingly, as mentioned above, the reasonable accommodation of Jackson's disability was the
 18 subject of numerous communications between Chris Hansen and the employees charged with
 19 complying with the legal requirements of providing Jackson a reasonable accommodation. Items
 20 1-7, 9, and 10 on the amended privilege log constitute such communications and evidence not
 21 only requests and provisions of legal advice but also that litigation was anticipated.

22 3. The Work Product Doctrine Protects Material Prepared In 23 Anticipation Of Litigation

24 The work product doctrine protects from disclosure documents prepared in anticipation of
 25 litigation. *ChevronTexaco* at 1080. The distinct purpose of this doctrine is to shelter "the mental
 26 processes of the attorney, providing a privileged area within which he can analyze and prepare his
 27 client's case." *Id.* (quoting *U.S. v. Nobles*, 422 U.S. 225, 238 (1975)). Federal Rule of Civil
 28

1 Procedure 26(b)(3) protects the “mental impressions, conclusions, opinions, or legal theories” of a
2 party’s attorney pursuant to the doctrine.

3 Items 2 and 6-10 on the amended privilege log contain communications from Chris
4 Hansen to various ARC personnel. All of this correspondence was prepared in anticipation of
5 litigation and all contain Chris Hansen’s mental impressions, conclusions, opinions, or legal
6 theories related to anticipated litigation. All of these items generally address issues of liability
7 concerning reasonable accommodation of Jackson’s disability. Item 8 specifically addresses how
8 ARC should respond to Marc Jackson’s outburst in front of his subordinates upon learning that
9 ARC was issuing a Performance Improvement Plan to him. The outburst included Jackson’s
10 public declaration that he needed to call an attorney regarding this matter which raised the specter
11 of litigation. Accordingly, in addition to being protected by the attorney-client privilege, these
12 items are also protected under the work product doctrine. Accordingly, Plaintiff’s Motion to
13 Compel the production of documents in response to Request for Production No. 8 should be
14 denied.

15 **D. PLAINTIFF’S REQUEST FOR PRODUCTION NO. 20:**

16 *Any and all witnesses' statements, interview notes, declarations, affidavits, and/or factual*
17 *accounts regarding Plaintiff including, but not limited to, such document generated during any*
18 *and all investigations involving Mark Jackson's complaint(s) of discrimination including, but not*
19 *limited to, investigative documentation.*

20 **SUMMARY OF ARC’S RESPONSE TO REQUEST FOR PRODUCTION NO. 20:**

21 ARC has created a privilege log to reflect documents which are responsive to this request,
22 all of which are protected from disclosures all of which are privileged and/or work product.

23 **1. ARC Has Provided A Privilege Log For Request for Production No. 20**

24 In her May 27, 2008 letter to the Court, Plaintiff’s counsel explains that Request for
25 Production No. 20 is not vague, ambiguous or unintelligible, as claimed by ARC because “Brown
26 and Robert Browning testified that an in depth investigation was conducted of Marc Jackson in
27 January 2007 which resulted in the Performance Improvement Plan. As Ms. Telfer and ARC’s
28 counsel have discussed, the investigation of Marc Jackson in January 2007 was not based on and

1 had no relation to any complaint of discrimination by Marc Jackson which is what Request for
2 Production No. 20 appears to pertain to. As counsel for the parties have also discussed, Jackson
3 never made an internal complaint of discrimination, and the first written complaint ARC received
4 was a DFEH Complaint Ms. Telfer, filed on behalf of Jackson on March 23, 2007. Prior to Ms.
5 Telfer filing Jackson's DFEH Complaint, ARC first became aware that he was claiming
6 discrimination when Ms. Telfer called ARC's Senior Counsel Chris Hansen claiming that the
7 disciplinary action issued to Jackson on February 22, 2007 was discriminatory.

8 In addition to being created in anticipation of litigation, the only documents in ARC's
9 possession custody or control which discuss Jackson's complaint of discrimination are privileged
10 communications between ARC employees and their in-house counsel Chris Hansen or between
11 ARC employees and ARC's outside counsel. As ARC's counsel previously discussed and agreed
12 with Plaintiff's counsel, ARC has prepared a privilege log to reflect these communications which
13 might be construed as responsive to Request for Production No. 20. (See Exhibit C). ARC has
14 responded to this request consistent with an agreement reached between counsel, and there is no
15 further action for the Court to compel.

16 **E. FURTHER DEPOSITIONS OF STEVE BROWN AND ROBERT**
17 **BROWNING**

18 In their meet and confer call on May22, 2008, counsel for ARC advised Plaintiff's counsel
19 that ARC would cooperate in producing Brown and Browning at mutually convenient times and
20 locations in connection with questions which flow from the additional documents which ARC has
21 produced subsequent to Plaintiff deposing these individuals. ARC still intends to cooperate in
22 this manner; however, it must advise the Court, Plaintiff and his counsel that since the time of
23 counsels' meeting, Browning has left his employment with ARC, and so ARC may not be in a
24 position to obtain Browning's agreement to appear without a subpoena.


25 **V. CONCLUSION**

26 Because Plaintiff has failed to provide the authority required to compel ARC to produce
27 irrelevant documents and has failed to establish why attorney-client privilege or work product
28

1 protections should not be afforded to the documents withheld on these bases, ARC respectfully
2 request that the Motion to Compel be denied.

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4
5 Dated: June 6, 2008

Respectfully submitted,
BAKER & HOSTETLER LLP

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8 SABRINA L. SHADI
9 Attorneys for Defendant
10 AMERICAN RED CROSS BLOOD
11 SERVICES SOUTHERN CALIFORNIA
12 REGION, Improperly Sued As The American
13 Red Cross and STEVE BROWN
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BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

EXHIBIT A

Brian Setencich v. The American Red Cross, et al.
Case No. C07-03688

Privilege Log of American Red Cross Regarding Request for Production No. 8

Item No.	Date	Document	Privilege
1	8/26/05	Email Chain between Bob Browning, Marlene Zweig and Chris Hansen re Marc Jackson	Attorney-Client
2	8/31/05	Email from Marlene Zweig to Chris Hansen re Update on Marc Jackson	Attorney-Client/ Attorney Work Product
3	8/31/05	Email Chain between Chris Hansen, Marlene Zweig and Stephen Brown re Update on Marc Jackson	Attorney-Client
4	8/31/05	Email from Marlene Zweig to Chris Hansen re Letter from Marc Jackson's Doctor	Attorney-Client
5	8/31/05	Email from Marlene Zweig to Chris Hansen and Bob Browning re Letter from Marc Jackson's Doctor	Attorney-Client
6	9/1/05	Email Chain between Marlene Zweig and Chris Hansen re Letter from Marc Jackson's Doctor with final response from Bob Browning	Attorney-Client/ Attorney Work Product
7	9/1/05	Email Chain between Marlene Zweig and Chris Hansen re Letter from Marc Jackson's Doctor	Attorney-Client/ Attorney Work Product
8	2/23/07	Email Chain between Chris Hansen, Heather Kayne, John Browning, Barbara Kay, Stephen Brown and Gregory Ballish re Marc Jackson	Attorney-Client/ Attorney Work Product
9	5/24/07- 5/29/07	Email Chain between Heather Kayne, Chris Hansen John Browning and Stephen Brown re Physician Letter	Attorney-Client/ Attorney Work Product
10	6/12/07	Email Chain between Chris Hansen and John Browning re Marc Jackson	Attorney-Client/ Attorney Work Product

EXHIBIT B

John R. Browning, Jr.

April 23, 2008

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1 they're having difficulties.

2 **A Uh-huh.**

3 **Q** So I go to you and say, What am I supposed to do
4 at this point? I know this person is struggling. What
5 procedure should I follow with this employee to make sure
6 that we're following the reasonable accommodation of the
7 American Red Cross? What would you tell me to do?

8 **A Call up Chris Hansen.**

9 **Q** And who is Chris Hansen?

10 **A Office of the general counsel. He's our field
11 liaison.**

12 **Q** Is he an attorney?

13 **A Yes.**

14 **Q** So anytime an employee within the American Red
15 Cross blood services needs a reasonable accommodation,
16 they have to work with the in-house attorney, Chris
17 Hansen?

18 **A No.**

19 **MS. SHADI:** Misstates testimony. Go ahead.

20 **THE WITNESS:** What I'm saying is that depends on
21 the degree of it, the degree of the situation. If there's
22 any question as to what is a reasonable accommodation or
23 what is an undue burden on the company, anything in there
24 like that, that's going to go to the office of general
25 counsel. If it's something that somebody says they need

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John R. Browning, Jr.

April 23, 2008

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1 to provide this and this. Three, the accommodations
2 available include special equipment, alternative
3 positions, et cetera.

4 Are there any type of written policies and
5 procedures that provide specifics so that employees within
6 the west division know what generally the procedure is to
7 follow?

8 **MS. SHADI:** I'm going to state an objection to
9 counsel's testimony regarding what is the normal procedure
10 or practice. You can answer that question.

11 **THE WITNESS:** No, there's not, to my knowledge.
12 There's no checklist, to my knowledge. If there is one, I
13 wouldn't be surprised, but there's none, to my knowledge.
14 The reason, we don't have policies and procedures on every
15 incident that can occur. There's some stuff that's common
16 sense that you're going to do to accommodate somebody's
17 situation like that. I don't see that that has to be
18 written out into a policy or a procedure. The only time
19 it gets dicey is when you have to determine whether or not
20 it's an undue burden on the company. That's when we go
21 get legal's interpretation.

22 **BY MS. TELFER:**

23 **Q** How do you know what the best accommodation is
24 for the individual based on their limitations, then, if
25 there's no written procedure to follow? Are they supposed

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1 to move their chair or it needs to be raised up a couple
2 inches and the safety department says yeah, that would
3 really help them out, we would just do that. That's an
4 accommodation. It depends on the complexity.

5 **BY MS. TELFER:**

6 **Q** I understand that, but how do you ensure that
7 employees in the west division follow the reasonable
8 accommodation policy if no one knows what the procedures
9 are within the west division?

10 **MS. SHADI:** Argumentative. Go ahead.

11 **THE WITNESS:** The procedure is to try to make a
12 reasonable accommodation. If there's a question as to
13 whether or not the reasonable commendation puts an undue
14 burden on the company, then we go to legal counsel. If
15 it's something you can do for yourself, our policy says
16 that we have to do that, and we're going to do that.

17 **BY MS. TELFER:**

18 **Q** I'll give you an example. Say that someone
19 has -- their doctor says they have some limitations. To
20 reasonably accommodate the individual, you need to know
21 what the exact limitations are and what is available to
22 the employee, so there's usually written policies and
23 procedures to follow, like a checklist, such as get
24 documentation, medical documentation, from the employee.
25 Two, see what alternatives are available if we're unable

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1 to guess?

2 **A No.**

3 **Q** Okay. What procedure --

4 **A You previously mentioned it. An interactive
5 discussion.**

6 **Q** With who?

7 **A The employee.**

8 **Q** Anyone else?

9 **A It depends on -- maybe somebody in ergonomics and
10 safety.**

11 **Q** Is there a written policy that describes who may
12 be involved in the interactive process?

13 **A I've already testified that there isn't any such
14 thing, to my knowledge.**

15 **Q** Is job modification a potential reasonable
16 accommodation within the American Red Cross?

17 **A I believe so.**

18 **Q** Is there any written documentation that is
19 supposed to be filled out if an employee within the west
20 division requested accommodation during the time period
21 that you were the HR director?

22 **A Not any form that I'm aware of. However, I'm
23 sure that there would be a notation made of it so that the
24 issue had been addressed.**

25 **Q** What do you mean by notation?

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EXHIBIT C

Brian Setencich v. The American Red Cross, et al.
Case No. C07-03688

Privilege Log of American Red Cross Regarding Request for Production No. 20

Date	Document	Privilege
3/15/07	Email from Christian Hansen to Stephen Brown and John R. Browning, Jr. with copy to Gregory S. Ballish re Setencich complaint and issues raised regarding Marc Jackson	Attorney-Client / Attorney Work Product
3/29/07	Email from Heather Kayne to Christian Hansen re Jackson DFEH Charge	Attorney-Client
3/29/07 to the present	Several emails between Christian Hansen to outside counsel Ronald Klepetar and/or Sabrina Shadi regarding Jackson DFEH Charge filed on March 14, 2007 and new DFEH charge filed on March 6, 2008	Attorney-Client / Attorney Work Product
4/4/07	Email from Stephen Brown to Christian Hansen and John R. Browning, Jr. re Marc Jackson Lawsuit	Attorney-Client
4/4/07	Email from Christian Hansen to Stephen Brown to and John R. Browning, Jr. re Marc Jackson Lawsuit	Attorney-Client/ Attorney Work Product
4/4/07	Email From Nancy Penman on behalf of Stephen Brown to Christian Hansen and John R. Browning, Jr. re Marc Jackson DFEH charge	Attorney-Client
4/4/07	Email From Christian Hansen to Steve Brown and John R. Browning, Jr. re Marc Jackson DFEH charge	Attorney-Client / Attorney Work Product

PROOF OF SERVICE

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 12100 Wilshire Boulevard, 15th Floor, Los Angeles, California 90025-7120. On June 6, 2008, **OPPOSITION OF AMERICAN RED CROSS BLOOD SERVICES SOUTHERN CALIFORNIA REGION TO PLAINTIFF BRIAN SETENCICH'S MOTION TO COMPEL DEFENDANT AMERICAN RED CROSS' FURTHER RESPONSES TO DEMAND FOR PRODUCTION** will be served on the person(s) listed below:

- ☒ via electronic mail by the United States District Court – Live System.
- ☐ by placing the document(s) listed above in a sealed envelope and causing postage to be placed thereon, fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.
- ☐ by causing the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth below.

Jill P. Telfer, Esq.
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 Email: jilltelfer@yahoo.com

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 6, 2008, at Los Angeles, California.


 CHARLENE E. STAMPS